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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

GROTH-HILL LAND COMPANY, LLC., a California limited liability company; ROBIN HILL, an individual a/k/a Robin Groth a/k/a Robin Groth-Hill; and JOSEPH HILL, an individual; and CROWN CHEVROLET, a California corporation,

Plaintiffs,

vs.

GENERAL MOTORS LLC, a Delaware limited liability company; ALLY FINANCIAL, INC., a Delaware corporation who is successor-in-interest to GMAC, Inc., GMAC Financial Services LLC, GMAC LLC and General Motors Acceptance Corporation; RANDY PARKER, an individual; JAMES GENTRY, an individual; KEVIN WRATE, an individual; INDER DOSANJH, an individual; CALIFORNIA AUTOMOTIVE RETAILING GROUP, INC., a Delaware Corporation; and DOES 1 through 25, inclusive,

Defendants.

Case No. C 13 1362 TEH

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS GENERAL MOTORS LLC, RANDY PARKER AND JAMES GENTRY

[Fed R. Civ. P. 8(a)(2), 9(b), 12(b)(6)]

Hearing Date: May 20, 2013
Time: 10:00 a.m.

Courtroom 2, 17th Floor
Hon. Thelton E. Henderson

TABLE OF CONTENTS

I. CROWN'S CLAIMS AGAINST THE GM DEFENDANTS ARE BARRED BY THE 363 SALE ORDER AND, SEPARATELY, BY LIMITATIONS 1

II. THE GROTH PLAINTIFFS LACK STANDING TO SUE THE GM DEFENDANTS UNDER RICO OR STATE LAW 2

III. THE CONSPIRACY TO DEFRAUD CLAIM FAILS AS A MATTER OF LAW 7

A. Legal Standards Governing Motion To Dismiss Conspiracy Claims 7

B. There Is No Factual Basis for the Conspiracy Claim 8

IV. THE EMOTIONAL DISTRESS CLAIMS ARE FRIVOLOUS 10

V. THE NINTH CAUSE OF ACTION IS ALSO BARRED 11

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

117 Sales Corp. v. Olsen,
80 Cal.App.3d 645 (1978) 8

Ashcroft v. Iqbal,
556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) 7

Beck v. Prupis,
529 U.S. 494, 500, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) 8

Bell Atlantic Corp. v. Twombly,
550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) 7,9

Davis v. Superior Court,
175 Cal.App.2d 8 (1959) 9

Doctors' Co. v. Superior Court,
49 Cal.3d 39 (1989) 8

Geier v. American Honda Motor Co.,
529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) 10

Gekas v. Pipin (In re Met-L-Wood Corp.),
861 F.2d 1012 (7th Cir.1988),
cert. denied 490 U.S. 1006, 109 S.Ct. 1642, 104 L.Ed.2d 157 (1989) 2

Holmes v. Securities Investor Protection Corp.,
503 U.S. 258, 267-68, 112 S.Ct. 131, 117 L.Ed.2d 532 (1992) 6

Kidron v. Movie Acquisition Corp.,
40 Cal.App.4th 1571 (1995) 8,9,10

Lui Ciro, Inc. v. Ciro, Inc.,
895 F.Supp. 1365 (D.Haw.1995) 5

Manson v Stacescu,
11 F.3d 1127 (2d Cir.1993),
cert. denied 513 U.S. 915, 115 S.Ct. 292, 130 L.Ed.2d 206 (1994) 3,4

Michael R. v. Jeffrey B.,

158 Cal.App.3d 1059 (1984) 9

Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago,

877 F.2d 1333 (7th Cir.1989) 2,3 5

Religious Technology Center v. Wollersheim,

796 F.2d 1076 (9th Cir.1986) 11

Schick v. Lerner,

193 Cal.App.3d 1321 (1987) 9

Southern Union Co. v. Southwest Gas Corp.,

165 F.Supp.2d 1010 (D.Ariz.2001) 9,10

Sparling v. Hoffman Construction Co.,

864 F.2d 635 (9th Cir.1988) 4,5

Stein v. United Artists Corp.,

691 F.2d 885 (9th Cir.1982) 5,6

Swartz v. KPMG LLP,

476 F.3d 756 (9th Cir.2007) 7

Valley National Bank of Arizona v. Needler (In re Grantham Bros.),

922 F.2d 1438 (9th Cir.),

cert. denied 502 U.S. 826, 112 S.Ct. 94, 116 L.Ed.2d 66 (1991) 2

Vinci v. Waste Management, Inc.,

80 F.3d 1372 (9th Cir.1996),

cert. denied 520 U.S. 1119, 117 S.Ct. 1252, 137 L.Ed.2d 333 (1997) 6

Statutes and Rules

Clayton Act, § 4 (15 U.S.C. § 15) 6

Fed. R. Civ. Proc. 9(b) 7

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1964(c) 6

I. CROWN'S CLAIMS AGAINST THE GM DEFENDANTS ARE BARRED BY THE 363 SALE ORDER AND, SEPARATELY, BY LIMITATIONS

Plaintiffs' Opposition ("Opp.") chides Messrs. Parker and Gentry for failing to cite "authority" showing that the 363 Sale Order shields them from liability arising out of their employment by Old GM. Opp., p. 5. The only needed "authority," however, is the express language of the 363 Sale Order, which the Opposition conspicuously ignores:

> "Except for the Assumed Liabilities expressly set forth in the MPA, ***none of the Purchaser*** [*i.e.* New GM], its present or contemplated members or shareholders, its successors or assigns, ***or any of [its]*** agents, officials, ***personnel***, representatives, or advisors ***shall have any liability for any claim that arose prior to the [July 10, 2009] Closing Date***, relates to the production of vehicles prior to the Closing date, or otherwise is assertable against the Debtors [including Old GM] or is related to the Purchased Assets prior to the Closing Date."

Request for Judicial Notice ("RJN"), Exh. B., ¶ 46 (emphasis added). As New GM "personnel" on the Closing Date,[1] Messrs. Parker and Gentry are protected by this provision from liability for any and all of their acts and omissions arising out of their employment by Old GM. While Crown correctly states that the 363 Sale Order "was meant to shield the purchaser of Old GM (i.e., New GM) from any liability created by the actions of Old GM" (Opp., p. 5), the quoted language shows that the intended scope of protection was actually much broader. It would obviously defeat the cardinal purpose of the 363 Sale Order – launching New GM free and clear of Old GM's liabilities – to permit litigation claimants to circumvent the ban on suing New GM based on pre-petition events by simply suing New GM's employees for alleged pre-petition conduct on behalf of Old GM – exactly what Crown and the Groth plaintiffs are attempting in this case.

Thus, whatever the general rule might be under California law concerning the tort liability of corporate employees, that rule is simply irrelevant here. The 363 Sale Order,

[1] Under the Amended and Restated Master Sale and Purchase Agreement ("MSPA") New GM offered employment to Old GM employees such as Parker and Gentry. *See* RJN, Exh. A, p. 8 (term "Applicable Employee" included all salaried Old GM workers); *id.*, ¶ 6.17(a) (New GM was required to offer employment "to all Applicable Employees").

which stands as the equivalent of a final federal judgment with full res judicata effect, bars as a matter of law each and all of plaintiffs' pre-Closing Date allegations against Messrs. Parker and Gentry for conduct in the course of their employment by Old GM, including without limitation claims that they (1) participated with Old GM in the formation of a "RICO" conspiracy in the mid-2000s, (2) committed alleged torts that injured Crown during 2008, or (3) committed alleged torts that hurt the Groth plaintiffs before the July 10, 2009 Closing Date of the 363 Sale. *See* Gekas v. Pipin (In re Met-L-Wood Corp.), 861 F.2d 1012, 1016 (7th Cir.1988), *cert. denied* 490 U.S. 1006, 109 S.Ct. 1642, 104 L.Ed.2d 157 (1989) (*held*, section 363 sale order was a res judicata bar); Valley National Bank of Arizona v. Needler (In re Grantham Bros.), 922 F.2d 1438 (9th Cir.), *cert. denied* 502 U.S. 826, 112 S.Ct. 94, 116 L.Ed.2d 66 (1991) (affirming Rule 11 sanctions for collateral attack on binding and final section 363 sale order).

Without more, the GM defendants' motion to dismiss all of Crown's claims for relief should be granted without leave to amend. Separately, the GM defendants join Ally's motion to dismiss Crown's claims based on the expiration of statutes of limitations and adopt by this reference the arguments in Ally's papers and reply memorandum.

II. THE GROTH PLAINTIFFS LACK STANDING TO SUE THE GM DEFENDANTS UNDER RICO OR STATE LAW

Without even mentioning – and thus waiving – the issue of standing under state law, the Groth plaintiffs claim standing under RICO based on alleged "direct injury" arising out of (1) their personal guaranties of GBC's floor plan and other debt; (2) their pledging of real property as security for their guaranty of GBC's debt; and (3) their agreement to sell the property to repay GBC's debt.

While the Groth plaintiffs may claim this is direct injury, legally it is not. As explained in Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago, 877 F.2d 1333, 1335-36 (7th Cir.1989), the relationship of a guarantor of corporate debt to the corporation is that of a contingent creditor. If the corporation defaults and the guarantor must make good on the debt, the guarantor becomes a creditor of the corporation (here, GBC) to the extent of its payment of the debt. Thus, the Groth plaintiffs had the right to collect from GBC the payment they made to Ally. In that regard, they stood in no better position than a general unsecured creditor of GBC. *See* 877 F.2d at 1336-37 (absent injury to a creditor "independent of [a bankrupt] firm's fate," his injury is derivative and he must take his "place in line" as a creditor in bankruptcy).

Here, contrary to this rule, the Groth plaintiffs are asking the Court, in effect, to skip them to the front of the line, ahead of all of GBC's other creditors, by permitting them to sue to recover losses that actually were suffered by GBC. Permitting such a suit, as explained in Mid-State Fertilizer, would sanction potential double recovery of the same losses by the corporation and by its equity and debt investors (*i.e.*, by the plaintiffs in the Mid-State case and by the Groth plaintiffs in this case):

> Investors gain or lose with the firm; stockholders receive what's left after the corporation pays its debts. Lenders (guarantees are a form of contingent loan) also gain or lose with the firm.... In all of [their] roles -- as equity investors, as debt investors (guarantors), and as human capital investors (managers) -- the [plaintiffs] gained and lost with Mid-State. A blow costing Mid-State $ 1 could not cost the [plaintiffs] more than $ 1. An award putting the $ 1 back in Mid-State's treasury would restore the [plaintiffs] to their former position.
>
> The derivative nature of such injuries leads courts in antitrust cases to hold that neither investors nor employees may recover. RICO … cases have followed the path blazed in antitrust....
>
> Good reasons account for the enduring distinction between direct and derivative injury. When the injury is derivative, recovery by the indirectly-injured person is a form of double counting. 'Corporation' is but a collective noun for real people-investors, employees, suppliers with contract rights, and others. A blow that costs 'the firm' $100 injures one or more of those persons. If … we allow the corporation to litigate in its own name and collect the whole sum (as we do), we must exclude attempts by the participants in the venture to recover for their individual injuries. … Suits by shareholders, guarantors, and the like may well be efforts to divert the debtor's assets--to pay off one set of creditors (here, the [plaintiffs]) while keeping the proceeds out of the hands of the firm's other creditors.

877 F.2d at 1335-36 (citations omitted). Here, similar to Mid-State Fertilizer and Manson v. Stacescu, 11 F.3d 1127 (2d Cir.1993), *cert. denied* 513 U.S. 915, 115 S.Ct. 292, 130

L.Ed.2d 206 (1994), the Groth plaintiffs were "responsible personally for the repayment of this loan and [having repaid Ally] have become creditors of [GBC]. Creditors of a bankrupt corporation … generally do not have standing under RICO." 11 F.3d at 1130.

The gist of plaintiffs' claim in this case is that the defendants allegedly formed a "conspiracy" or "racketeering enterprise" that aimed to drive ***GBC*** out of business. For whatever reason – be it alleged racketeering, the automotive industry meltdown, the economic crisis, mismanagement, or anything else – GBC did go out of business and ended up in chapter 7 bankruptcy. ***That*** is what allegedly injured the Groth plaintiffs because as creditors of GBC they no longer had the ability to recover from GBC their payments to Ally to retire the debt owed by GBC. Such injury is ***derivative***, not "direct," and does not confer standing to sue because the Groth plaintiffs did not suffer any injury that was distinct from the injuries suffered by other creditors and shareholders of GBC.

To be sure, the Groth plaintiffs claim they were injured when they were allegedly "forced" to give Ally their secured guaranties, but in fact they did not suffer any legal injury at that time. If, to use plaintiff's words, GBC "had ultimately thrived" (Opp., p. 18), their contingent liability under the secured guaranties would never have ripened and, contrary to their argument, they would ***not*** have suffered any loss. Similarly, even after they were allegedly "forced" to sell their property to repay Ally in 2009, they still could have recovered their payments from GBC if it had gone on to "thrive." It was the fact that GBC *did not thrive* and instead ended up in bankruptcy *two years later* that injured the Groth plaintiffs; *at that time* they suffered exactly the same derivative injury as other creditors (and shareholders) of GBC.

Thus, as the cases uniformly hold, the alleged RICO violations were ***not*** the "proximate cause" of the Groth plaintiffs' injuries deriving from their guaranties and do not confer standing to sue for those injuries under RICO or on any other basis. Manson, 11 F.3d at 1130 ("The creditor generally sustains injuries only because he has a claim against the corporation. The creditor's injury is derivative of that of the corporation and is not caused proximately by the RICO violations."); *accord* Sparling v. Hoffman

Construction Co., 864 F.2d 635, 640-41 (9th Cir.1988) (denying RICO standing to guarantors of corporate bonds); *see also* Stein v. United Artists, 691 F.2d 885, 896 (9th Cir.1982) (Kennedy, J.) ("the Steins have no standing as creditors or guarantors of Century, because their losses … simply reflect the injury to the corporation, which forced it to default on [the guarantied] loans").

The Groth plaintiffs attempt in vain to distinguish the Mid-State and Sparling holdings on the ground that their injuries are "distinct" from those suffered by other GBC shareholders and creditors. Opp., p. 16. But they are not. As Judge Easterbrook explained in Mid-State Fertilizer:

> We know that creditors cannot recover directly for injury inflicted on a firm, so guarantors as potential creditors likewise cannot recover. *One could say that guarantors are different because they may deal directly with the wrongdoer. The [plaintiffs'] guarantees were contracts between them and Exchange. But direct dealing is not the same as direct injury.*"

877 F.2d at 1336. In Lui Ciro, Inc. v. Ciro, Inc., 895 F.Supp. 1365 (D.Haw.1995), where the plaintiffs claimed, as the Groth plaintiffs say here, that they were induced to sign guaranties by fraud, the Court adopted this same analysis in denying plaintiffs standing to sue under RICO. *Id.* at 1372. Here, like the Luis, the Groth plaintiffs lack standing because their alleged injury as guarantors ***derives inherently from the injury to their corporation***. There, as in this case, the plaintiffs would not have been injured if the principal obligor (here, GBC) had not defaulted on its loan obligations and, ultimately, gone bust. As explained above, the Groth plaintiffs did not suffer any injury until those events occurred even though, as in Mid-State Fertilizer and Lui Ciro, they claim to have "deal[t] directly with the [alleged] wrongdoer."

In other words, it simply is not true that "even if GBC had ultimately thrived, the Groth Plaintiffs would have sustained damages." Opp., p. 18. In that event, as creditors of GBC, they either would not have had to pay Ally in the first place or they could have recovered the sums paid to Ally *unless GBC went out of business and ended up in chapter 7 bankruptcy*. Those events, not the alleged RICO conspiracy, were the proximate cause of the Groth plaintiffs' injuries, which are exactly the same injuries suffered by other GBC creditors. Only GBC and, later, its bankruptcy trustee had standing to sue for injuries, and neither ever did so.

To be sure, the Groth plaintiffs also claim injury based on the timing of the "forced" sale of their property at a "fire sale" price. Opp., p. 18. Losses due to the vicissitudes of the economy, however, and specifically losses occasioned by declines in the market for commercial real estate, are not losses of which the alleged RICO violations are properly viewed as a "proximate cause" under Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 267-68, 112 S.Ct. 131, 117 L.Ed.2d 532 (1992).

Finally, the Opposition cites no legal authority supporting its claim that Ms. Hill has standing because she allegedly was a "personal target" of the alleged racketeering and, in fact, this claim is directly contrary to the Ninth Circuit's holding in Stein denying standing to an individual who claimed that an antitrust violation was intended to drive him personally out of the industry. There, under section 4 of the Clayton Act (the model for the RICO civil damage statute), the Ninth Circuit said this:

> The threat of double recovery exists even though Stein has alleged that the conspiracy was intended to or directed at injuring the corporation in order to drive him out of the industry as a shareholder. Regardless of whether the conspiracy was focused on Stein or Century, which might affect the policies behind the remoteness limitation embodied in our target area test, ***the conspiracy was carried out against the corporation***, in the market for first-run motion pictures.

691 F.2d at 897 (emphasis added). Stein mandates the same result here under 18 U.S.C. §1964(c) which contains the same statutory language as section 4 of the Clayton Act. *Accord* Vinci v. Waste Management, Inc., 80 F.3d 1372, 1375 (9th Cir.1996), *cert. denied* 520 U.S. 1119, 117 S.Ct. 1252, 137 L.Ed.2d 333 (1997) ("This rule [*i.e.*, the rule denying individual standing] applies even if … the shareholder alleges that the antitrust violations were intended to drive the individual out of the industry").

III. THE CONSPIRACY TO DEFRAUD CLAIM FAILS AS A MATTER OF LAW

While the complaint alleges in general terms an overarching conspiracy to drive ***GBC*** out of business, GBC obviously is not a plaintiff in this case, and the fraud claims that the Groth plaintiffs attempt to assert in their personal capacities are based ***exclusively*** on the alleged misstatements and concealment of Ally's and Mr. Wrate's intent that supposedly induced them to provide the secured guaranties and, later, sell their property to repay Ally a portion of the sums owed by GBC.

Even more narrowly, the fraud claims asserted against New GM, Parker and Gentry rest solely on a conspiracy theory, *i.e.*, the complaint does not allege that the GM defendants made misrepresentations, but only that they are *vicariously* liable for the promissory fraud allegedly practiced by Ally and Mr. Wrate. Further, the allegations of conspiracy liability rest on entirely conclusory allegations that "Gentry, Parker [and] New GM … were aware that Wrate and Ally were making false promises to the Groth Plaintiffs in their quest to financially weaken Groth Bros. Chevrolet and drive it out of business [and] agreed with Wrate and Ally and intended that the false promises be made." FAC, ¶ 148. These conclusory allegations do not state a plausible claim for relief under federal pleading rules and the substantive California law of conspiracy.

A. Legal Standards Governing Motion To Dismiss Conspiracy Claims

Under Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed. 2d 868 (2009), a complaint to survive a motion to dismiss must plead sufficient facts to make out a plausible claim against the defendants. A conspiracy is an unlawful agreement. A complaint in a conspiracy case must make "allegations *plausibly suggesting* (not merely consistent with) [an unlawful] agreement" in order to comply with "the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to '*sho[w] that the pleader is entitled to relief.*'" Bell Atlantic, 550 U.S. at 557. Further, as explained in Ashcroft, 556 U.S. at 678, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." And, since the alleged aim of the "conspiracy" in this case was to defraud, Rule 9(b) requires the Groth plaintiffs to plead the facts supporting their conspiracy claim with particularity including, as the Groth plaintiffs acknowledge, identification of "'the role of [each] defendant[] in the alleged fraudulent scheme.'" Opp., p. 31, *citing* Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir.2007).

The essential elements of conspiracy liability are "the formation and operation of a conspiracy, the wrongful act of any of the conspirators thereto and damage resulting therefrom." Doctors' Co. v. Superior Court, 49 Cal.3d 39, 44 (1989); 117 Sales Corp. v. Olsen, 80 Cal.App.3d 645, 650 (1978). Conspiracy alone is not a tort and does not give rise to a cause of action unless a civil wrong has been committed resulting in damage to the plaintiff. Essentially the same is true under RICO. Beck v. Prupis, 529 U.S. 494, 505-06, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000).

B. There Is No Factual Basis for the Conspiracy Claim

In the moving papers, the GM defendants argued that the Groth plaintiffs did not allege any "wrongful act" by the GM defendants that damaged ***them***, as opposed to GBC, for which they would have standing to sue. The Opposition's response? That Parker and Gentry – when employed by Old GM – assisted in "funneling dealerships" to Mr. Dosanjh and CARG and "engaged in wrongful conduct when Parker received kickbacks for their participation in the fraud and racketeering…." Opp., p. 27. Beyond the bar of the 363 Sale Order, these allegations obviously do not identify any "wrongful act" that damaged ***the Groth plaintiffs***, as opposed to GBC, and fall far short of identifying any "role" that Parker or Gentry played in defrauding ***them***.

And, as for New GM, the Groth plaintiffs simply do not – because they cannot – respond to the argument, presented front and center in the moving papers, that New GM is not liable for the alleged promissory fraud practiced by Ally and Mr. Wrate because the object of the alleged conspiracy – inducing the Groth plaintiffs to provide the secured guaranties and then agree to liquidate the collateral – had been accomplished ***before New GM commenced operations on July 10, 2009***. *See* Kidron v. Movie Acquisition Corp., 40 Cal.App.4th 1571, 1593-94 (1995) (no conspiracy liability for joining conspiracy after its object is already accomplished); *accord* Southern Union Co. v. Southwest Gas Corp., 165 F.Supp.2d 1010, 1021 (D.Ariz.2001) ("[T]he conspiracy concluded … when [here, the Groth plaintiffs] signed the [a]greement[s]" based on alleged fraud in the inducement that pre-dated their joinder").

Simply put, no ***facts*** alleged by the Groth plaintiffs connect any of the GM defendants to the alleged promissory fraud which is the only alleged fraud claimed to have injured ***them*** as opposed to GBC. Still less does the First Amended Complaint contain sufficient factual content – as opposed to conclusory fantasy – to support a ***plausible*** claim that the GM defendants entered into an unlawful agreement, or conspiracy, or "enterprise," to harm the Groth plaintiffs. Bell Atlantic, 550 U.S. at 557.

Specifically, the First Amended Complaint does not and cannot plead any facts showing that, in 2008 and early 2009, New GM – ***which did not even exist yet*** – or the other GM defendants had "actual knowledge" in advance that Ally planned to make allegedly false promises to the Groth plaintiffs, let alone that the GM defendants "concurred" in the alleged plan or aided it in any way. *See* Southern Union, 165 F.Supp. 2d at 1026 (no actionable conspiracy claim stated where plaintiff failed to plead "specific facts from which the inference may be drawn that [two of the defendants] agreed, implicitly or tacitly, that Southern Union should be fraudulently induced to sign the Agreement"); *id.* ("Nor do Southern Union's allegations contain specific facts from which the inference may be drawn that [two of the defendants] knew that Southwest and Maffie planned to fraudulently induce Southern Union to sign the agreement, that they concurred in such a plan, and that they intended to aid in the plan's implementation," *citing* Kidron, 40 Cal.App.4th at 1582).

Further, "actual knowledge of the planned tort, without more, is not a sufficient basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission. 'The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective *and their* *intent to aid in achieving that objective*.'" *Id.* (emphasis added), *citing* Schick v. Lerner, 193 Cal.App.3d 1321, 1328 (1987); Michael R. v. Jeffrey B., 158 Cal. App.3d 1059, 1069 (1984) ("[m]ere knowledge, acquiescence, or approval of an act, without cooperation or agreement to cooperate is insufficient to establish liability"); *see also* Davis v. Superior Court, 175 Cal.App.2d 8, 23 (1959) (conspiracies "cannot be established by suspicions…. Mere association does not make a conspiracy. There must be … participation or interest in the commission of the offense."). "'This rule derives from the principle that a person is generally under no duty to take affirmative action to aid or protect others.'" Kidron, 40 Cal.App.4th at 1582 (citation omitted); *see also* Southern Union, 165 F.Supp.2d at 1021.

Here, the Groth plaintiffs have not alleged any *facts* showing that Old GM, Mr. Parker or Mr. Gentry had "actual knowledge" in late 2008 or in May 2009 that Messrs. Wrate and Lazar allegedly were planning to misrepresent Ally's intent regarding future exercise of its right to suspend GBC's floor plan, much less that New GM (which did not even exist at the time), Parker or Gentry participated in the alleged promises to plaintiffs or aided Ally in any way. So even if the 363 Sale Order did not immunize Parker and Gentry for their conduct on behalf of Old GM prior to the 363 Sale Order (which it does), the complaint simply does not allege any plausible basis for the Groth plaintiffs' conspiracy claims against them.

IV. THE EMOTIONAL DISTRESS CLAIMS ARE WITHOUT MERIT

The Eighth Cause of Action alleges in conclusory terms (FAC, ¶¶ 190-91) that the GM defendants intentionally inflicted emotional distress upon Ms. Hill by taking actions that (1) caused damage to GBC for which she lacks standing to sue for the reasons set forth above and (2) are outside the applicable limitations period and in some cases pre-date the Closing Date of the 363 Sale and thus are barred by the 363 Sale Order. GM also adopts the additional arguments regarding the Eighth Cause of Action advanced by Ally and CARG in their moving and reply papers.

V. THE NINTH CAUSE OF ACTION IS ALSO BARRED

The Groth plaintiffs argue that the moving papers cite no authority for the proposition that the use of the Unfair Competition Law to obtain injunctive relief for alleged RICO violations that the U.S. Congress expressly chose ***not*** to permit in a civil RICO suit is pre-empted by federal law. While it seems self-evident that state law cannot "undo" a concrete and definite federal legislative choice, GM notes as well that Geier v. American Honda Motor Co., 529 U.S. 861, 873, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), aptly summarizes the federal law of "conflict pre-emption" as follows: "This Court, when describing conflict pre-emption, has spoken of pre-empting state law that 'under the circumstances of the particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress….'"

Here, obviously, a state statute that purports to authorize injunctive relief for violation of a federal statute that itself ***does not permit such relief*** meets this standard and, indeed, is sufficiently "'conflicting; contrary to; . . . repugnan[t]; differen[t]; irreconcilab[le]; [and] inconsisten[t]'" as to flagrantly trespass upon the exclusive domain of federal law guarded by the Supremacy Clause of the U.S. Constitution. *Id.*; *and see* Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1084 (9th Cir.1986). And, because the Ninth Cause of Action asks *only* for injunctive relief, it must be dismissed in its entirety without leave to amend.

CONCLUSION

For all the foregoing reasons, the GM defendants' motion to dismiss the First Amended Complaint should be granted without leave to amend.

Dated: May 6, 2013

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